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In the Supreme Court of the United States

OCTOBER TERM, 1980

COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF TRANSPORTATION, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

LAWRENCE G. WALLACE
Acting Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

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Petitioner contends that the Court of Claims violated Rule 147(b) of the Rules of that court by failing to give sufficient deference to the factual findings of the trial judge.[1]

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[1] Rule 147(b) of the Rules of the Court of Claims provides:

Trial judge's report. The court may adopt the trial judge's report, including conclusions of fact and law, or may modify it, or reject it in whole or in part, or direct the trial judge to receive further evidence, or refer the case back to him with instructions. Due regard shall be

1. Pursuant to the Federal-Aid Highway Act, 23 U.S.C. 101 *et seq.*, the federal government authorized petitioner to construct a segment of an interstate highway in northeast Pennsylvania (Pet. App. 50a). Under the Act, the government was obligated to pay 90% of the total cost of the highway (Pet. App. 49a).

a. Shortly after construction began, the Milford Water Authority ("Milford") complained that the highway construction was adversely affecting the quality of its water supply (Pet. App. 51a-52a). Petitioner employed an engineering consultant who investigated the problem and concluded that it was caused by the highway construction (Pet. App. 52a). The consultant recommended redesign of the highway's drainage system and rapid refoliation of excavation sites (Pet. App. 52a, 56a), which would have cost approximately $58,000 (Pet. App. 52a). In the event that these measures proved insufficient, the consultant recommended (1) construction of a one million gallon steel reservoir at an estimated cost of $100,000, or (2) construction of a water treatment facility at an estimated cost of $560,000 (Pet. App. 52a, 56a).

Milford filed suit against petitioner in state court, seeking construction of a filtration system, drainage revisions, and money damages (Pet. App. 55a). Initially, petitioner agreed to build a 1.5 million gallon reservoir (Pet. App. 5a, 62a). That agreement later was rescinded and petitioner agreed to pay Milford $275,000 in settlement of the lawsuit (Pet.

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given to the circumstance that the trial judge had the opportunity to evaluate the credibility of the witnesses; and the findings of fact made by the trial judge shall be presumed to be correct.

App. 62a). Federal officials were aware of the negotiations between petitioner and Milford, but never approved the settlement (Pet. App. 63a). Milford's water problem eventually resolved itself (Pet. App. 5a n.3, 63a).

b. Petitioner also paid $835,612.45 to settle a dispute with its construction contractor on the project, Gasparini Excavating Company (Pet. App. 6a-8a). Gasparini had requested petitioner's approval for a specified borrow site, *i.e.*, a soil and rock excavation site (Pet. App. 63a). Concerned that use of this site might exacerbate Milford's water problem, petitioner agreed that Gasparini could use the requested site but only if Milford also gave its approval (Pet. 31a, 67a). Milford withheld its approval and Gasparini eventually used other borrow sites (*ibid.*). Gasparini then submitted a $2,314,017.25 claim to petitioner for delay costs and increased borrow costs (Pet. App. 32a, 71a). Petitioner's agreement to pay Gasparini $835,612.45 (Pet. App. 72a) to settle the dispute was not approved by any federal official, and petitioner's request for reimbursement was denied by the Federal Highway Administration (Pet. App. 82a).

c. Petitioner filed this action against the United States seeking recovery of 90% of the amount it had paid to Milford and Gasparini (Pet. 4). The trial judge held in favor of petitioner as to the money paid to settle both the Milford and Gasparini claims and recommended judgment against the United States in the sum of $999,551.20 (Pet. App. 25a-84a). The trial judge concluded that the government was liable for costs actually incurred by petitioner in the course of the project unless the government proved that the costs were incurred negligently or unreasonably (Pet. App. 40a). As to the amounts petitioner paid to

settle the two disputes, the trial judge found that the government had not met this burden of proof (Pet. App. 40a-49a).

The government filed exceptions to the trial judge's recommended decision. The Court of Claims modified the decision of the trial judge and entered judgment for petitioner in the amount of $133,200 (Pet. App. 1a-21a). The majority agreed with the trial judge that the government was required to reimburse reasonable settlement costs under its project agreement (Pet. App. 8a-9a). The Court of Claims held, however, that petitioner and not the government had the burden of proving that the amounts paid were reasonable (Pet. App. 10a-13a). As to the Milford settlement, the Court of Claims concluded that any amount in excess of $58,000 was unreasonable because that was the estimated cost of revising the drainage system and of refoliating the excavation sites, the primary solution recommended by petitioner's consultant (Pet. App. 13a-18a). As to the Gasparini claim, the court held that petitioner could have limited Gasparini's additional costs to $90,000 if petitioner had made a timely decision on the request for an alternative borrow site (Pet. App. 20a-21a). Accordingly, it limited petitioner's recovery to $81,000 (90% of $90,000) on this claim (Pet. App. 21a). In a separate opinion, Judge Nichols stated that he would have dismissed the complaint in its entirety on the ground that the amounts sought exceeded the ceiling provided in the agreement between petitioner and the federal government (Pet. App. 21a-23a).

2. Petitioner's only claim in this Court is that the Court of Claims violated its own Rule 147(b) by failing to presume that all of the trial judge's findings of fact were correct (Pet. i). However, even if Rule

147(b) were deemed to be applicable to a case such as this,[2] that issue would not warrant review by this Court.

The court below correctly held that the amounts petitioner paid to Milford and Gasparini were unreasonable. The Court of Claims' decision as to the Milford claim was based upon the estimated cost of the primary solution recommended by petitioner's consultant. Indeed, even that solution proved to be unnecessary because the problem with Milford's water eventually resolved itself. Petitioner does not challenge the Court of Claims' decision as to the amount of money that would have been saved by Gasparini if petitioner had acted promptly on the request for alternative borrow sites (see Pet. 11-12).

Notwithstanding the presumption set forth in Rule 147(b), the ultimate responsibility for determining matters before the Court of Claims rests with the court itself. See, *e.g.*, *Montgomery Coca-Cola Bottling Co.* v. *United States*, 615 F.2d 1318, 1322 (Ct. Cl. 1980); *Bringwald, Inc.* v. *United States*, 334 F.2d 639, 643 (Ct. Cl. 1964).

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

LAWRENCE G. WALLACE
Acting Solicitor General

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[2] The Court of Claims' primary disagreement with the trial judge was on an issue of law, not fact. The court held that the trial judge had erred in placing the burden of proving the unreasonableness of the settlements on the government. By its literal terms, therefore, the presumption prescribed in Rule 147(b) is inapplicable.

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